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No. 661

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

HUGH A. VORIS, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR, FOR THE EIGHTH COMPENSATION DISTRICT, *Petitioner*,

VERSUS

CHARLES EIKEL AND B. D. HARRIS D/B/A SOUTHERN STEVEDORING & CONTRACTING CO. AND TEXAS EMPLOYERS' INSURANCE ASSOCIATION, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION

TO THE HONORABLE JUDGES OF SAID COURT:

The petition herein seeks a review by this Court of the notice provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 912, which provides that written notice must be given to the Deputy Commissioner and to the employer within thirty (30) days after the date

of the injury. It is without dispute that no such written notice was given in this case. Under certain conditions, the failure to give such notice is not a bar to the claim for compensation. These are found in Section 12(d) of the Act (33 U.S.C. 912(d)):

> "(d) Failure to give such notice shall not bar any claim under this Act
>
> "(1) If the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier had knowledge of the injury or death and the Deputy Commissioner determines that the employer or carrier had not been prejudiced by failure to give such notice,
>
> or
>
> "(2) If the Deputy Commissioner excuses such failure on the ground that for some satisfactory reason such notice could not be given * * * "

The record is clear and it is indeed without dispute that neither the employer nor the insurance carrier had any knowledge of the injury sustained by this man. The government thus seeks to have this Court review the decision of the Court of Appeals for the Fifth Circuit on these two questions concerning the two exceptions to the requirement that written notice be given within thirty (30) days:

1. Did the employer's agent in charge of the business in the place where the injury occurred have knowledge of the injury, and has any prejudice by the failure to give such notice resulted to the employer and carrier?

and

2. Is there some satisfactory reason why such notice could not be given?

Statement

After a careful review of the entire record, considered as a whole, both the District Court and the Court of Appeals for the Fifth Circuit (by majority decision) have expressly found that the evidence did not sustain the Deputy Commissioner's finding that the agent in charge of the business in the place where the injury occurred had knowledge of the injury and that the evidence did not sustain the finding that there was some satisfactory reason why such notice could not have been given. Both the District Judge and the Court of Appeals for the Fifth Circuit expressly found that the identity of the employer and his agent in charge was undisputed in this record and that there was a complete want of any evidence that either had any knowledge of the injury (R. 230, 243, 244). Indeed, the District Court stated:

"All evidence is to the contrary." (R. 230).

Briefly, for the convenience of the Court, there is set out here the chain of command as it existed on board the vessel on the date of this alleged injury (not *ex post facto* at the compensation hearing as counsel for petitioner contends on p. 14 of the petition), but as supported by the testimony in the record as it actually existed on that particular day:

B. D. Harris—Employer—A contracting stevedore and one of the partners in Southern Stevedoring & Contracting Company—in charge of unloading ship.

A. P. David—Agent in charge of business when employer, Mr. Harris, not aboard the vessel—usually called stevedoring superintendent—only regular employee of Southern Stevedoring & Contracting Company aboard vessel that night.

R. J. Tarpey—Timekeeper—keeps time men work and handles clerical job of filling out injury reports—not regularly employed by employer but hired through Timekeepers' and Checkers' Union.

Ernest Wisby—Walking Foreman or Sub-Walking Foreman—not person in charge of unloading ship—not a regular employee of employer—no authority to send injured men to the doctor—a colored longshoreman hired to get work out of other colored longshoremen.

Lester Lovely—Gang Foreman of gang claimant was working in—no authority to send men to doctor.

Longshoremen—Men actually working in gang doing manual labor, including claimant.

The Court is of course familiar with the distinction between a stevedore who is specially skilled in stowing and discharging cargo from vessel, and a longshoreman, who is unskilled and simply does the manual labor under the direction of the stevedore. Mr. Harris and Mr. David were the only stevedores on the vessel, all of the other men being longshoremen doing the manual labor of discharging the cargo except Mr. Tarpey who was the timekeeper and checker.

The testimony of the various witnesses as to who the agent in charge of the business at the place where the injury occurred and what, if any, knowledge of the injury such agent had, was as follows:

Claimant EARL PORTER

1. Told walking foreman Wisby about injury aboard vessel. (R. 68, 94).
2. Told walking foreman Wisby about injury again two or three days later. (R. 91).

LESTER LOVELY

1. Was gang foreman. (R. 135).

2. Had no authority to send injured men to doctor. (R. 136).

ERNEST WISBY

1. Was walking foreman, or sub-walking foreman. (R. 127, 131).
2. Not a regular employee of Southern Stevedoring & Contracting Company but his employer changes from day to day. (R. 128).
3. Had no authority to send men to doctor. (R. 130).
4. Claimant told him he was hurt and Wisby told claimant to report injury to timekeeper. (R. 129).
5. Was not the person in charge of loading the ship. (R. 128).
6. Was not the head foreman, there was another fellow over him. (R. 130).

R. J. TARPEY

1. He was to keep time and also fill out injury reports. (R. 187).
2. Had no knowledge of injury. (R. 187, 188).
3. Walking foreman Wisby reported no injury. (R. 188).
4. After flash fire inquired if anyone was injured and informed no one was hurt. (R. 190).
5. He not a regular employee. (R. 188).
6. First knowledge of any injury was three weeks before November 10, 1950. (R. 189).
7. A. P. David was in charge of the work aboard the vessel. (R. 188).

A. P. DAVID

1. Was agent in charge of unloading the ship. (R. 193).
2. Had no knowledge of an injury and no report of an injury made. (R. 194).
3. Walking foreman Wisby did not report an injury to anyone. (R. 194).
4. Made inquiry about flash fire and no one said they were hurt. (R. 195).

5. Timekeeper normally makes out injury reports. (R. 195).

B. D. HARRIS

1. Was in charge of discharging ship. (R. 179).
2. A. P. David was agent in charge of work aboard vessel when Mr. Harris not there. (R. 179).
3. David was a regular employee of Southern Stevedoring & Contracting Company. (R. 179).
4. No report of injury made. (R. 182).
5. No knowledge of injury prior to July 13, 1950. (R. 180, 183).
6. Wisby was walking foreman, had no authority to send injured men to doctor and was not a regular employee. (R. 181).
7. Wisby had no authority to receive notice of injury there solely to get work out of the longshoremen of his race. (R. 182).
8. Saw Wisby twice after work on the vessel was completed and nothing said about an injury to anyone. (R. 183, 184).

As the foregoing summary clearly indicates, it is without dispute that Mr. A. P. David was the employer's agent in charge of the business in the place where the injury occurred. Counsel for the government contends that the walking foreman or sub-walking foreman Wisby was the agent in charge. That Wisby was not the agent in charge of the business of unloading this vessel is shown quite clearly by his own testimony, by that of the timekeeper Tarpey, by that of the stevedoring superintendent David and by that of the employer Harris. To sustain the government's contention that Wisby was the agent of the employer in charge of the business in the place where the injury occurred would require this Court to hold something which is plainly contrary to the undisputed evidence in the record.

The date of the alleged injury was December 19, 1949. The employer and insurance carrier did not receive notice

of the injury until sometime after July 1, 1950, almost seven months later (R. 180, 191). During this period of time, the employer and insurance carrier had no opportunity to investigate the facts while they were still fresh in the minds of the witnesses, nor did they have any opportunity to furnish prompt and proper medical care and attention so that the injured man's disability might be reduced to a minimum.

Contrary to the impression which the petitioners seek to leave in their petition, we are not concerned here with an illiterate and ignorant colored longshoreman who had no knowledge as to who was his employer or to whom his injury should be reported. The record shows clearly that on no less than two occasions, the man that the petitioners seek to have designated as the employer's agent in charge, Wisby, expressly told the claimant that he, Wisby, was not the man to whom a report of injury should be made, but rather that it was someone else (R. 129). Wisby further informed the claimant that he had no authority to send him to a doctor and told him the name of the man that he would have to report to (R. 129, 130). In addition to this, on the Friday following the alleged injury of Monday, December 19, 1949, the claimant knew who his employer was from the pay envelope which he received. This left remaining at least twenty-five days in which he could have given written notice of his injury or brought knowledge home to his employer or agent in charge (R. 92, 93).

We thus do not have an illiterate colored longshoreman who did everything that he could to bring notice home to his employer. Rather, we have a situation in which the plain provisions of the Longshoremen's and Harbor Workers' Compensation Act with respect to notice have been utterly disregarded.

Argument

What is involved in this case for decision is not what some poor, illiterate colored longshoreman thought or could do (see p. 2 petition). Rather, it is, what the Congress meant by the plain language it used in Section 12(d)(1) of the Act, when it referred to the employer's "agent in charge of the business in the place where the injury occurred".

In respondents' view Congress was neither illiterate nor ignorant in speaking as they did: when they said "Agent in charge" it meant precisely what it said.

There is no showing in the petition that the matter sought to be reviewed by this Court has any likelihood of a recurrence or is likely to come up outside of the private litigation involved in the present case. On pp. 10 and 11, the petitioner seeks to attach much importance to this particular matter by commenting (a) upon the lack of formal education possessed by employees under the Act (a matter in no way a part of this record) and that, (b) as a practical matter, notice cannot be given by the ordinary longshoreman to the man required by the statute, and (c) that "unquestionably" this decision of the Court of Appeals for the Fifth Circuit would "lead to the denial of many meritorious claims for compensation". Such are simply not the facts.

These fears are as groundless as the record to support them. Simple history refutes the cry that this court must invoke its discretionary jurisdiction to settle an important matter of recurring importance.

In the twenty-six years that the Longshoremen's and Harbor Workers' Compensation Act has been in existence, the present case is only the fifth time in which this part of the notice provisions of the Act have ever been considered by the Courts. See:

Fulton v. Hoage, 77 F. 2d 110 (Ct. of App., D.C. 1935);
Oldman Boiler Works v. McManigal, 58 F. Supp. 697 (D.C. N.Y., 1944);
Lindsey v. Lawson, 93 F. Supp. 817 (D.C. Fla., 1950);
Hoage v. Royal Indemnity Co., 90 F. 2d 387 (Ct. of App., D.C. 1937), Cert. Denied, 302 U.S. 736, 82 L. Ed. 569, Rehearing denied, 302 U.S. 774, 82 L. Ed. 602.

Of these four cases, in only one of them was the question of notice of sufficient importance for the Court to include any facts as to who the agent in charge of the place where the injury occurred might be. In FULTON v. HOAGE, 77 F. 2d 110 (Ct. of App., D.C. 1935), the Court held that the knowledge of the superintendent of the hospital where the claimant worked was not the agent in charge of the business at the place where the injury occurred and his knowledge, therefore, was not sufficient to excuse the failure of the claimant to give the written notice required by the Act.

The present holding of the Court of Appeals for the Fifth Circuit in this case is in accord with that view.

Many thousands and thousands of claims are handled each year under the Longshoremen's and Harbor Workers' Compensation Act, and the fact that in the period of twenty-six years there have been only five litigated cases remotely raising this question of notice indicates quite clearly that the court is in reality asked merely to review the correctness or incorrectness of a single case on facts which may, and likely will, never happen again.[1]

[1] Statistics available locally to respondents reflect that from July 1, 1927, the effective date of the Act, through Fiscal year 1949, a total of 1216 cases have been filed seeking judicial review of compensation awards under the three coverages (longshoremen, District of Columbia, defense bases) of the Act; see Annual Re-

Agent in Charge of Business in Place Where Injury Occurred Had No Knowledge of Alleged Injury

To sustain the Deputy Commissioner's finding that the *agent in charge* of the business in the place where the injury occurred had knowledge of this injury this Court will have to hold that the walking foreman, Wisby, was the agent-in-charge.

As both the District Court and the Circuit Court of Appeals have already held upon a careful review of the entire record, this walking foreman, Wisby, was not the employer's agent in charge of the business in the place where the injury occurred. This man denied he was the agent in charge of the operations aboard the vessel and stated that there was another man over him (R. 128, 130).

It is undisputed that the business of the employer in the place where the injury occurred was the discharging of this particular vessel of its cargo. The question is thus posed: Who was the agent in charge of discharging this vessel? Was it the inexperienced and unskilled colored longshoreman, Wisby, as contended by the petitioner? Or was it, as found by two courts below, a man who was trained and skilled as a stevedore and who was expressly left there to handle the operations aboard the vessel?

It is undisputed in this record that Wisby, the walking foreman, was an unskilled, manual laborer, just as was the claimant. Neither of them was aboard the vessel for the purpose of handling any of the numerous problems which arise as to the method of discharging, the starting or stop-

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port, Bureau of Employees' Compensation, Federal Security Agency, 1949, pp. 11-12. 5/1216ths is hardly a matter of recurring importance. Especially is this so in the face of the tremendous volume of accidental injuries or deaths where benefits are paid without litigation. For example, during Fiscal 1950, 101,162 injuries and 259 deaths were reported; and $9,124,843.00 was actually paid. 38th Annual Report of Secretary of Labor (1950), pp. 103-112, p. 112(c).

ping of the discharging of cargo and each of which involve the necessity for management responsibility, [redacted]. They were aboard simply to assist in the manual labor involved in the cargo operations.

On p. 12 of the petition, an attempt is made to imply that the walking foreman, Wisby, was present aboard the vessel at the time the injury was sustained "directly supervising the unloading operations", while the agent in charge, David, was in the vessel's galley. An attempt is made to leave the impression that the walking foreman, Wisby, was actually aboard the vessel directly supervising the unloading operations. However, such was clearly not the case, for in his own testimony, Wisby stated that he was not even aboard the vessel at the time the injury was allegedly sustained, but instead had gone ashore for some water and when he returned, all of the men were out of the hold, off of the vessel and on the wharf (R. 128, 129).

Some reference is also made to the fact that Wisby "hired" the claimant and was responsible for paying off the men on behalf of the employer. All of these men, including the walking foreman, Wisby, were hired through the International Longshoremens' Association (ILA) union hall. The mere fact that Wisby assembled these men at the union hall for work aboard the vessel and at a later time, in his capacity as a union official, delivered to each of the longshoremen their pay envelopes cannot raise his status to that of an employee who hired and fired the men. It is simply a coincidence in this case that the union official who assembled the gang to work aboard the vessel, and who later delivered their pay envelopes to them, also served in the capacity of walking foreman aboard the vessel (R. 183, 184). In any case the person who performs the mechanics of hiring or firing may well be something much less than

the agent in charge. Congress certainly did not use any such formulae.

The petitioner's entire position on the agent in charge question is pointed up by this statement, found on p. 14 of the petition:

> "The primary consideration is who had, *insofar as the injured employee could determine*, control over the work being performed." (Italics ours)

Respondents believe there is no such place for a *subjective* test in terms of what the injured party believes to be an "agent in charge".

Congress did not come into the problem of the Longshoremen's industrial protection without a considerable experience in its operations.

The Congress must have realized that there would be foremen, walking foremen, or superintendents as well as agents in charge of the business in the place where the injury occurred. Congress made its awareness irrefutable for it expressly made the knowledge of such a superintendent or foreman sufficient to charge medical expenses to the employer under Section 7 (a) (33 U. S. C. 907 (a)).

In short, when the nature of the injury was such as to require immediate medical treatment and services, the knowledge of the superintendent or the foreman and their failure to provide them was sufficient to bind the employer. However, when Congress dealt with the notice provisions of the Act, they very carefully used a different term: agent in charge of the business at the place where the injury occurred. Additionally, Congress completely failed to make any reference to a superintendent or a foreman.

When it came to giving notice of an injury sufficient to bind the employer, something which a man could take as much as thirty days to effect, Congress was careful to see

that the knowledge be brought home either to the employer or to his agent in charge and not simply to a superintendent or foreman. This Court can hardly disregard the very different terms employed and read the Act as though some words either were not used or, worse, were not intelligently used.

There are many good reasons well supported by this record why it is essential to have notice of a high degree for compensation to become payable. Medical payments for emergency treatment needing the knowledge only of the foreman may well be imposed with no great risk. After all the Deputy Commissioner will have full power over *future* medical. As to the benefits (which can now amount to a life-time accident policy under the 1948 amendments 33 U.S.C. 914 (m)), an employer is entitled to know, not merely have knowledge *imputed* to him by what some employee might know whose job does not require him to know, handle, process and receive such notices and who does not have standing as a supervisory director with discretion.

Indeed, that Congress deliberately chose not to use "superintendent or foreman" in the notice provisions is shown plainly by the fact that the term in dispute, "or his agent in charge of the business in the place where the injury occurred" it used again in Section 30(f) (33 U.S.C. 930(f)). Section 30(f) provides that where this notice has been given, or the agent in charge of the business in the place where the injury occurred has knowledge of it, and thereafter a report of the injury is not by the employer made to the Deputy Commissioner as required by the Act, then the one year period of limitation within which a claim can be filed does not begin to run until the employer has made such a report.

Congress used the language "or his agent in charge of the business in the place where the injury occurred" in two different sections of the Act. It specifically referred to "super-

intendent or foreman" in still another section of the Act. How can that add up to a claim that the language can be avoided because it produces what some assert is a hardship in an individual case?

But that is precisely what the petitioner seeks to have this Court do—amend the statute so that there shall be added the words "superintendent or foreman". Exactly the same attempt was made with reference to another section of the Longshoremen's and Harbor Workers' Compensation Act by the Bureau of Employees' Compensation in the case of WARREN H. PILLSBURY v. UNITED ENGINEERING COMPANY, 342 U.S. 197, decided on January 2, 1952. This Court rejected the claim it had the power to change the statute. The Court, through Mr. Justice Minton, said (at p. 199, 200):

> "We are not free, under the guise of construction, to amend the statute by inserting therein before the word 'injury' the word 'compensable' so as to make 'injury' read as if it were 'disability' * * *.
>
> "We are aware that this is a humanitarian act, and that it should be construed liberally to effectuate its purposes; but that does not give us the power to rewrite the statute of limitations at will, and make what was intended to be a limitation no limitation at all. Petitioners' construction would have the effect of extending the limitation indefinitely if a claim for disability had not been filed; the provision would then be one of extension rather than limitation. While it might be desirable for the statute to provide as petitioners contend, the power to change the statute is with Congress, not us."

The teaching of this decision has been followed by the Court of Appeals for the Second Circuit in CHRISTENSEN v. THE UNITED STATES, 194 F. 2d 978 (decided February 6, 1952).

The contention by the petitioner that the knowledge of the walking foreman, Wisby, was imputable to the employer or to the agent in charge is an attempt to completely ignore the notice provisions of the Act. It is an attempt to make what was intended by the Congress to be a limitation on who could receive notice for the employer no limitation at all. The phrase "or his agent in charge of the business in the place where the injury occurred" was, as the statute plainly and clearly indicates, a limitation specifically set by the Congress to give the Courts, the Deputy Commissioners, indeed, even the Bureau of Employees' Compensation, a guide on which to base their determinations on the question of notice. To hold that the knowledge of the walking foreman, Wisby, is imputable to the employer or to the agent in charge is simply a subterfuge to evade the plain statutory mandate of the Congress. Had Congress intended that the knowledge of someone less than the agent in charge should be sufficient under the notice provisions, it is only reasonable to expect that they would have expressly included this language in the Act, and that they would not have relied on the Bureau of Employees' Compensation or the Courts to extend it by judicial interpretation.

It is contended that the knowledge of the foreman is either held sufficient under most state workmen's compensation acts or the knowledge of the foreman is held to be imputable to the employer.

In preparing the brief in the District Court and the Court of Appeals for the Fifth Circuit, we personally checked the Workmen's Compensation Act in each of the forty-eight states. Only two of them have language on this question of the employer's knowledge which is substantially the same as the decisive language of the Longshoremen's and Harbor Workers' Compensation Act. For the most part, these forty-six state acts refer generally to "employer",

"or his agent", "or representative", and contain no limitation which in any way approaches that present in the Longshoremen's and Harbor Workers' Compensation Act. Under these broad, general terms, it is not unusual to find the Courts extending them to include foremen and lesser employees. With no statutory definition it is proper in such instances (and would be under the Federal Act as well in the absence of the legislative standard) to apply ordinary principles of imputed knowledge. But that is done on familiar doctrine of agency, master and servant, etc. and in no sense does the search become one of trying to ascertain whether the person was an "agent in charge". It is enough if he is an "agent".

Only Florida (F. S. A. Section 440.18) and Montana (Rev. Codes of Mont., Section 92-807) have substantially comparable language to that contained in the Longshoremen's and Harbor Workers' Compensation Act. The cases decided by the Courts of those two states show clearly that the actual agent in charge of the business in the place where the injury occurred is the one who must have the knowledge before it is binding on the employer. See:

Bordens Dairy v. Zanders, 42 So. 2d 539, (Sup. Ct. of Fla., 1949); (Knowledge of claimant's superiors then in charge of operating the dairy held sufficient);

Meeken v. Crowder, 158 Fla. 361, 28 So. 2d 435 (1947); (Knowledge of foreman on job who rejected claim because claimant had not sustained an accidental injury held sufficient);

Anderson v. Jerrell, 157 Fla. 212, 25 So. 2d 490 (1946). (Knowledge of brother who was operating sawmill for a brother who was overseas held sufficient);

Maki v. Anaconda Copper Mining Company, 287 P. 171 (1930). (Knowledge of claim agent and safety engineer not enough since they were not employer's "managing agent or superintendent in charge of the

work upon which the injured employee was engaged at the time of the injury");
State v. Industrial Accident Board, 102 Mont. 455, 59 Pac. 2d 785 (1936)). (Court refused to decide the question and disposed of the case on other grounds).

It thus appears that, where a limitation has been imposed by a state legislative body similar to that under the Longshoremen's and Harbor Workers' Compensation Act, the decisions of those state courts are in complete accord with the decision of the Court of Appeals for the Fifth Circuit in this case and with the Court of Appeals for the District of Columbia in FULTON v. HOAGE, 77 F. 2d 110 (1935).

The mere fact that there are many state court cases which refer to notice to a "foreman" as being sufficient, is of no significance here. The inquiry is not the name given to the job which the man had, but whether, in truth and in fact, the walking foreman, Wisby, was the agent in charge of the employer's business at the place where the injury occurred. The fact that Wisby was designated as a "foreman" does not determine whether he was or was not an agent in charge. On this factual controversy both the District Court and the Court of Appeals have expressly held that, on the whole record there is no evidence to sustain the Deputy Commissioner's finding of fact that Wisby was the agent-in-charge.

The record remains as it always has been, undisputed, that the agent in charge was the stevedoring superintendent, David, and not the walking foreman, Wisby.

PREJUDICE TO EMPLOYER FROM LACK OF NOTICE

Little comment seems necessary here, for the plain and open prejudice to the employer and the insurance carrier in this case is amply demonstrated. It is demonstrated by

their inability to obtain the facts with reference to this injury while they were still fresh in the minds of the witnesses to thus determine whether the claim was genuine or, on the other hand attempt to prevent a possibly fraudulent or false claim. It is demonstrated by the inability of the employer to furnish prompt and proper medical care and attention so as to reduce the injured man's disability to a minimum. These things were all brought about directly by the claimant's failure to give the notice required under the Act. These are valuable rights of the employer-insurance carrier and are not to be lightly rejected.

The ability later on to ascertain the facts was graphically illustrated by the many different versions of claimant's injury as related by the various members of the longshore gang called as witnesses at the hearing held November 10, 1950 (11 months after the alleged injury of Dec. 19, 1949). The many irreconcilable versions were:

(1) Hurt coming out of hold (R. 129);

(2) Fell down on some dunnage (R. 136);

(3) Fell ten or twelve feet off of ladder into hold (R. 150);

(4) Fell or plank flew up and hit him (R. 157);

(5) Fell fifteen or twenty feet off a ladder (R. 166);

(6) Claimant's version—bullion fell and hit a standard which fell on him (R. 78).

Only prompt investigation would enable an employer to ascertain with fair reliability whether such an injury occurred. A "hearing" based on such palpably unreliable recollections is hardly sufficient substitute.

In addition to this, the claimant received no medical care and attention of any significance throughout the entire period or more than seven months from the date of his

injury until formal notice was given to the employer and insurance carrier.

After the lapse of a period of six or seven months, even the claimant himself could not remember the date of his alleged injury. In his testimony, and on various occasions, he gave at least four separate and distinct statements. (R. 119, 120, 99, 84, 91).

Who brought about this irretrievable uncertainty of the truth? Not the employer or the insurance carrier. All must be charged to the claimants own failure to give the notice required under the Act. When the employer is unable even to really ascertain the truth; where the "hearing", as here, demonstrates that time has erased the means of knowledge, then prejudice is present and real.

Both Knowledge of Agent in Charge and No Prejudice Must Be Established

Under the first exception to written notice, there must be a showing both that there has been no prejudice to the employer and that the employer's agent in charge of the business in the place where the injury occurred had knowledge of the injury. If either of these two requirements is not complied with, then this exception to written notice cannot be sustained. In other words, if there were prejudice, even though the employer's agent in charge had knowledge, this exception would not excuse lack of written notice. On the other hand, if the employer's agent in charge had no knowledge, even though there were no prejudice, the exception could not be sustained.

To sustain the Deputy Commissioner's finding with respect to this exception would be to rewrite the plain provisions of the Longshoremen's and Harbor Workers' Compensation Act. It would impose upon the stevedoring company an impossible task in keeping records of injuries and promptly

reporting them to the Deputy Commissioner as required by the Act. These walking foremen are simply union members, hired at the Union Hall from day to day, and they are men over whom the employers have no control after they leave their employ on each given day; men who are sent to their day's employment by a union in such a way that the employer has no opportunity to accept or reject; and men whose dependability in reporting injuries, the employer has no opportunity to ascertain. These men may be employed by one employer one day as walking foremen and do no more work for him for many weeks, indeed, perhaps for many months, or they may return as workers only. That such men are not the agents in charge within the meaning of the Act is plain and uncontradicted in this record.

Circuit Court Correctly Held That Some Satisfactory Reason Did Not Exist Why Such Notice Could Not Be Given

The petitioner here asserts that the Deputy Commissioner has the power in his discretion to excuse a failure to give this notice for some reason satisfactory to him, and in effect, that this exercise of discretion is not judicially reviewable.

In short, what petitioner says is that the Deputy Commissioner's power to excuse for some satisfactory reason invested the Deputy Commissioner with unlimited and unguided power to excuse or refuse to excuse as the Court of Appeals said, according to his "whim or caprice." (R. 244).

While the purported findings of fact made by the Deputy Commissioner, which he considered to be some satisfactory reason why the notice could not be given, are good "jury argument" designed to arouse the sympathy of a reviewing court, for the most part, they have no bearing whatsoever

on this particular matter. In fact, some of them are even contrary to the undisputed evidence.

The most that can be said for the Deputy Commissioner's finding in this regard is that the claimant was not a regular longshoreman, could not read nor write, except to sign his name, and these, we submit, are wholly insufficient to constitute some satisfactory reason why written notice could not be given. The ignorance and illiteracy of this colored longshoreman may well account for petitioner's assumption that he had no knowledge as to the notice provisions of the Act, but there is certainly no evidence in the record to sustain any such finding. If ignorance can excuse noncompliance with one law, or part of the law, why is he bound by any other?

This particular question has been considered by the Court of Appeals for the District of Columbia on two separate occasions. See:

Hoage v. Employers' Liability Assurance Corporation, 64 F. 2d 715 (Ct. of App., D.C., 1933), certiorari denied, 290 U.S. 637, 78 L. Ed. 554;

Hoage v. Royal Indemnity Company, 90 F. 2d 387 (Ct. of App., D.C., 1937), certiorari denied 302 U.S. 736, 82 L. Ed. 569, rehearing denied 302 U.S. 778, 82 L. Ed. 602.

The Court of Appeals for the Fourth Circuit has considered the question of a satisfactory reason for failure to give this notice in BETHLEHEM STEEL COMPANY v. PARKER, 72 F. Supp. 35 (D.C., Md., 1947), affirmed 163 F. 2d 334 (4 C.C.A. 1947).

In all three of the foregoing cases, the nature of the disability and its relation to the employment were not known to the claimant, and in each of them, this was held to be a satisfactory reason why such notice could not be given.

From our detailed check of the statutory provisions in

the Workmen's Compensation Acts of the forty-eight states, it appears that only six states have provisions on this satisfactory-reason question comparable to that of the Longshoremen's and Harbor Workers' Compensation Act. The language in the Florida statute (F.S.A., Section 440.18) and the Arkansas statute (Ark. S.A., 1947, Section 81-1317(d)(3)) is exactly the same, while the statutes of Maryland (ANNO. CODE OF MD., Article 101, Section 50), (NEV. COMPILED LAWS, Section 2716(1)), New York (N. Y. WORK. COMP. LAW, Section 18), and Oklahoma (85 OKLA. STAT. ANNO., Section 24), excuse the failure to give written notice if there is some "sufficient reason" that it could not be given.

The annotated statutes in these six states have been checked, and while there are many cases in which the language of the statute is used and an award affirmed or reversed, the cases either digress on some other statutory grounds such as no prejudice to the employer, or the facts which constituted a satisfactory reason are not shown in the opinion. This check involved the reading of all of the cases that could be found in the annotated statutes and other sources from these states, including more than eighty decisions from Oklahoma, over thirty from New York, and lesser numbers from the other states.

Under a comparable statute, the Oklahoma decisions hold that a claimant is charged with knowledge that he is required to give notice in writing of any injury within thirty days, and that the failure to give such notice is a bar to any claim under the act. See:

Bellmeyer v. Dover Oil Company, 181 Okla. 11, 71 Pac. 2d 973 (1937);
Hinderliter Tool Company v. Snyder, 163 Okla. 50, 20 Pac. 2d 558 (1933);
Coline Oil Company v. Vaughn, 157 Okla. 101, 11 Pac. 2d 121 (1932).

To follow the contentions asserted by the petitioner here that a man's illiteracy, his transitory employment as a non-regular longshoreman and, lack of knowledge of the notice provisions would destroy the very policy behind the requirement that that notice be given. The cases heretofore considered by the Federal Courts show quite clearly what is meant by the statutory phrase "some satisfactory reason why such notice could not be given." It usually means something such as not knowing the nature of the disability, or the medical consequences and its relation to the employment. It means a situation in which the claimant is ignorant of a matter of fact, that is, that the injury was in fact the origin of a disabling condition or that a disabling condition was in fact caused by an injury sustained in his employment. No such facts exist in this case, for the claimant admits that he knew from the date of the alleged injury that his disability was caused by the injury and knew the man to whom he should report, and within a few days after the alleged injury, knew the name of his employer, even if it was not known before then, and he still had ample time remaining within which to give the required notice within thirty days.

The District Court and the Court of Appeals for the Fifth Circuit have each examined this record in detail, and upon a careful consideration of the entire record have found that no satisfactory reason existed why such notice could not be given.

Conclusion

There are, in effect, three questions which petitioner seeks to have this Court review upon a writ of certiorari. These are:

(1) Whether the agent in charge had knowledge of the injury.

(2) Whether the employer was prejudiced.

(3) Whether some satisfactory reason existed why such notice could not be given.

All of these questions are factual issues to be determined upon a review of the entire record as required by the Administrative Procedure Act.

Under the review machinery of the Act the initial responsibility to determine whether the findings were supported by substantial evidence was placed on the District Judge. The District Judge, after a careful review of the entire record, found that these findings as to notice were not supported by substantial evidence.

The Court of Appeals for the Fifth Circuit was the next Court in the judicial process to review the entire record, and it, too, held that there was no substantial evidence in the record to support the Deputy Commissioner's findings.

When the Court of Appeals has made a decision, which turned essentially on the evaluation of testimony and evidence in the record as a whole, it is this Court's settled policy not to call up for review a conflict of evidence, nor to reverse a Court of Appeals simply because upon a consideration of the evidence, it might have reached a contrary result.

Mr. Justice Frankfurter stated this policy plainly, in N. L. R. B. v. PITTSBURGH STEAMSHIP COMPANY, 340 U.S. 498, at p. 503:

> "This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place, we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record, a Court of Appeals under the new

dispensation finds the Board's order unsubstantiated. In such situations we should 'adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.' Federal Trade Com. v. American Tobacco Co., 274 U.S. 543, 544, 71 L. Ed. 1193, 1194, 47 S. Ct. 663."

The case presented is a factual controversy already adequately determined by competent courts and, one which involves no really genuine pressing problem of statutory construction likely to recur.

It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

JOHN R. BROWN

Of Counsel:

E. D. VICKERY,
ROYSTON & RAYZOR,
877 San Jacinto Building,
Houston 2, Texas,
Attorneys for Charles Eikel and B. D. Harris, d/b/a Southern Stevedoring & Contracting Company and Texas Employers' Insurance Association

Copies of the within brief were served by me on Robert L. Stern, Acting Solicitor General of the United States, Washington, D. C., attorney for petitioner, by mailing copies thereof to him on this the ____ day of April, 1953.

JOHN R. BROWN